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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 595

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Petitioner,

vs.

NATHANIEL H. BRACY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATUTE

United States Code Annotated, Title 45, Sec. 51 et seq. 2

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Citation to Opinion Below.

Petitioner's citation to the opinion of the Supreme Court of the State of Montana, as amended, and annexed as Appendix "B" to the petition for certiorari is correct, except the word "care" should be "came" [28 Pet. 28]; after the citation of *Highshew v. Kusito* insert "133 N. E. 2d 76" [32 Pet. 4]; and, the word "would" should be "could" [32 Pet. 18], and with these corrections, the decision is adopted by reference.

Jurisdiction.

Jurisdiction is fully covered in the petition for certiorari and the statements there made are adopted here by reference.

Questions Presented.

The question of negligence and of proximate cause were answered in respondent's favor by the general verdict of the jury and we believe the evidence sufficient to sustain that verdict.

Petitioner presents four questions. For brevity we restate them as follows:

1. The giving of Instruction No. 27 [562R8]
2. The giving of Instruction No. 28 [562R13]
3. Concerning the evidence of negligence, and,
4. The sufficiency of the evidence regarding respondent's injuries and the permanency thereof.

Statement of the Case.

Respondent recovered judgment rendered on a Jury verdict for $27,500 for personal injuries sustained while employed as a fireman, but working as an engineer, on a switch engine. The action is one brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 *et seq.*

Respondent's amended complaint alleges negligence of petitioner proximately causing him injury while the railroad crew was making up a train in the railroad yards at Hillyard, Washington. It is alleged that the accident occurred at night and while respondent was pushing cars westward with the engine; that the operation was controlled by lanterns in the hands of switchmen whose duty it was to give to respondent signals designed to control the movement of the engine; that during the course of these operations there was a violent and sudden collision between the train which respondent was operating and cars that were stationary on the track; that the impact caused the injuries to respondent complained of;

that the negligence was attributed to switchmen who failed and neglected to give the appropriate signals that there were cars on the track and who were alleged to have been negligent in other particulars [4R30-6R10]; that there were three cabooses between the engine driven by respondent and the cars which he was pushing on the track [50R8], and these cabooses obstructed respondent's view so that it was his duty to, and he did, rely solely on lantern signals given by switchman Rowley who was stationed on the caboose next ahead of the engine [52R9]. Respondent could not see conductor Thompson on the lead car [53R18] nor switchman Harrington in the center of the train [53R21]; therefore, it was respondent's duty, as engineer, to follow the signals given by switchman Rowley who was on the caboose next ahead of the engine [52R9]. Switchman Rowley gave the starting signal [52R26] and it was conductor Thompson's duty to determine whether the movement could be made with safety [54R2]. Conductor Thompson, on the lead car to protect the train movement, gave two "easy signals" [303R29] about six or seven car lengths from the standing cars which was the normal distance to give "easy signals" in making that kind of movement [307R1]. Respondent's sole duty was to watch switchman Rowley's light and obey the signals given [56R2]. The only signal given by switchman Rowley, after the starting signal, was a "wash-out" signal, an emergency-stop signal [56R15] but the collision occurred before respondent could reach his emergency brake [58R2] injuring respondent [60R2].

Conductor Thompson admitted:

(a) The Company Rules provided: "that when passing through the yard it was the duty of the conductor and all brakemen to station themselves where they can observe and transmit signals" [312R6];

(b). that "before moving cars or engines in the yard or on the yard tracks, it must be known that they can be moved with safety" [324R21];

(c) That it was, "the conductor's duty to know they could be moved with safety" [324R26].

The jury, as the trier of the facts, held against petitioner's contentions on the issue of negligence, and returned a verdict for respondent in the sum of $27,500 upon which judgment was entered.

On appeal, the Supreme Court of Montana affirmed the judgment, *Bracy v. Great Northern Railway Company*, . . . Mont. . . . (unreported), 343 P. 2d 848. Rehearing denied September 23, 1959.

Reasons Why Writ of Certiorari Should Not Be Granted.

Question No. 1

The testimony of Conductor Thompson, in regard Company rules, was admitted without objection made or exception taken [312R10] [312R23] [324R21]. Both Federal and State law require that a dissatisfied litigant must obtain an adverse ruling, by the court, on the point involved before being in a position to contend that the Court committed error.

Hawkins v. Missouri Pac. R. Co., 188 F. 2d 348;

Stafford v. Hornbuckle, 3 Mont. 485; (Affirmed) 111 U. S. 389, 28 L. Ed. 468, 4 S. Ct. 515;

Batchoff v. Craney, 119 Mont. 157, 172 P. 2d 308.

The rules testified to are private safety rules and are admissible in evidence when their purpose is to protect the class of persons by whom suit is brought and when

their violation can reasonably be said to contribute to the injury sued upon,

Renaldi v. New York, New Haven & Hartford R. Co., (2 Cir.) (1956) 230 F. 2d 841, 844, citing cases,

and a violation of the rule, if proved, is "some evidence of negligence"

Johnson v. Erie Railroad Company, (2 Cir.) (1956) 236 F. 2d 352, 356

"A violation of company rules relative to safety for the conduct of its employees, general in terms, will not ordinarily constitute negligence as a matter of law, nor will observance of such rules as a matter of law necessarily be due care. It is for the jury's determination as to whether or not the violation or obeying of the rules along with the evidence as a whole constitutes negligence or lack of negligence."

Frabutt v. New York, C. & St. L. R. Co., 88 Fed. Supp. 821, 827.

QUESTION NO. 2

If the injuries alleged and proven are permanent, and are of such nature as to indicate a permanent material impairment of a substantial nature in the earning capacity of the workman, the mortality and annuity tables are admissible.

Vicksburg M. R. Company v. Putnam, 118 U. S. 545, 30 L. Ed. 257;

Colusa-Parrot Mining & Smelting Company v. Monahan (9 Cir.) 162 Fed. 276;

McNair v. Berger, 92 Mont. 441, 15 P. 2d 834.

Respondent may recover for decreased earnings based upon his future disablement,

Chesapeake & Ohio R. Co. v. Carnahan, 241 U. S. 241, 60 L. Ed. 979, 36 S. Ct. 594,

the same as a parent may recover for the death of a son, if there exists a reasonable expectation of pecuniary benefits from the continued life of the deceased, *irrespective of dependency.* (Italics Supplied.)

Gulf, C & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785, 33 S. Ct. 426;

Wade v. Rogala, 270 F. 2d 280, 284.

QUESTION No. 3

The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from the uncontroverted as well as the controverted facts, are questions for the jury.

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409;

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740;

Ellis v. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598.

All witnesses agreed that there was a collision and that respondent was injured.

"If the proof justifies with reason the jury's conclusion that the employers' negligence played any part, however slight, in producing the plaintiff's injury, the verdict must be sustained, and it is for the

jury to say whether or not such negligence so played a part, however slight."

Rogers v. Missouri P. R. Co., 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443.

The facts in this case were carefully canvassed by the trial court, on motion for a new trial, and also by the Supreme Court of Montana, on appeal, both holding that there is substantial evidence of employer negligence sufficient to present a jury question, and, where the evidence is conflicting, it is for the jury to resolve the conflicts.

Neither the trial Court nor the Supreme Court of Montana has decided any federal question of "substance" in a way contrary to the applicable decisions of this Court, nor in conflict therewith; and, no federal question of "substance" has been determined herein which has not heretofore been determined by this Court, nor are the rulings of the lower courts in conflict with any controlling federal decisions, so as to warrant further review of the case by this court.

In *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608, this Court in regard the function of a jury said:

> "we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions * * *
>
> The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty."

Of course the trial judge has the preliminary advantage of determining whether the employee has shown sufficient connection of cause and effect from which the jury might legitimately return a verdict in his favor but this advantage is really a preliminary exercise of his judgment on the facts, though many courts and text-writers refer to it as a "matter of law".

The common law has always prescribed a function to be performed by the court and by the jury in determining issues of negligence and of proximate cause but the common law limitations must yield to the general Congressional intent to provide liberal recovery for injured workmen, and the statute must be liberally construed in their favor.

> *Urie v. Thompson*, 337 U. S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018:
>
> "and this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care, for the employer owes the employee, as much as the duty of acting with care, the duty of complying with his statutory obligations."
>
> *Kernan v. American Dredging Co.*, 355 U. S. 426, 2 L. Ed. 2d 382, 78 S. Ct. 394.

On the question of negligence there is an issue in this case concerning whether or not certain signals were given and on that issue the evidence is conflicting, therefore

> "so long as an evidentiary basis for a jury verdict exists, the jury should be permitted to exercise its judgment"
>
> *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740.

After analyzing the record herein the Supreme Court of Montana said:

> "Likewise defendant's contention that the evidence of negligence was insufficient to make out a case for the jury cannot be sustained. At most the evidence on the point was conflicting and this makes the question one for the jury."
>
> *Bracy v. Great Northern Railway Company*, 343 P. 2d 848, 854.

And this pronouncement is in accord with the language used by this Court in the case of *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, wherein it is stated:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge of the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury * * *
>
> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The test of a jury case is clearly stated in the following recent cases:

Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443;

Webb v. Illinois Central R. Co., 352 U. S. 516, 1 L. Ed. 2d 503, 77 S. Ct. 451;

Gibson v. Thompson, 355 U. S. 18, 2 L. Ed. 2d 1, 78 S. Ct. 2;

Honeycutt v. Wabash Railway Company, 355 U. S. 424, 2 L. Ed. 2d 380, 78 S. Ct. 393;

Ferguson v. St. Louis-San Francisco Railway Company, 356 U. S. 41, 2 L. Ed. 2d 571, 78 S. Ct. 671;

Harris v. Pennsylvania Railroad Company, 4 L. Ed. 2d 1;

Conner v. Butler, 4 L. Ed. 2d 10.

QUESTION No. 4

Petitioner's question here strays beyond the record. No interrogatories were requested. None were submitted to the jury, and the verdict was general. Therefore, it is impossible to tell whether any allowance was actually made for loss of future earnings. This question, having no basic support in the record, requires, we submit, no further comment.

Conclusion.

This is not a case where the petitioner has been deprived of its day in Court: it has had a jury trial, a motion for new trial and an appeal to the highest Court of Montana. It now asks this Court to find the facts.

Petitioner's assertion that "defendants can look only to this Court to protect their rights" [Pet. 14] is amply

negated by the very record and by the compilation of the cases in which this Court has denied certiorari where lower Courts have withheld cases from the juries or have overturned jury verdicts for the employee, and have rendered judgment for the employer. (*Harris v. Pennsylvania Railroad Company*, 4 L. Ed. 2d 1, 5.)

The record amply shows negligence on the part of defendant's employees proximately resulting, in whole or in part, in the injury to respondent. The proper tribunal for the application of these standards to the facts in a particular case was established by our forefathers, and protection given by the Seventh Amendment to the Constitution of the United States. This was the tribunal that decided the questions of cause and effect in this case, and the judgment should be sustained. The petition for the Writ of Certiorari should be denied also for lack of gravity affecting the public interest. (*Brown v. Allen*, 344 U. S., 443, 491; 97 L. Ed. 471, 507, 73 S. Ct. 397.)

Respectfully submitted,

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